No. 85-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIRLINES, INC.;
REPUBLIC AIRLINES, INC.;
FRONTIER AIRLINES, INC.; and
OZARK AIRLINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE
STATE OF SOUTH DAKOTA, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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BRIEF OF AMICI CURIAE RAILWAY PROGRESS INSTITUTE AND ASSOCIATION OF AMERICAN RAILROADS

JAMES W. MCBRIDE
Counsel of Record
GREGORY G. FLETCHER
LAUGHLIN, HALLE, GIBSON & MCBRIDE
Suite 1000
1612 K Street, N. W.
Washington, D. C. 20006-2802
(202) 331-8501

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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INTEREST OF AMICI CURIAE

A. Introduction

Amici curiae, The Railway Progress Institute (RPI) and the Association of American Railroads (AAR), are voluntary, unincorporated, non-profit associations of companies that are closely connected with the railroad industry and that have a common interest in maintaining a strong national rail transportation system.[1] RPI is comprised primarily of companies that manufacture and supply railroad and high-speed rail equipment or that furnish fleets of specialty railroad cars for use in interstate commerce. AAR is comprised exclusively of interstate carriers by rail; AAR members incur approximately 92 percent of the linehaul mileage, employ about 94 percent of the railroad workers, and generate about 97 percent of the revenue of all railroads operating in the United States. Both RPI and AAR represent their members in matters of common concern before federal agencies and courts.

This case raises an important issue of statutory construction regarding the meaning of an amendment to the Federal Aviation Act of 1958, Pub. L. No. 97-248, §532, 96 Stat. 701-702 (Sept. 3, 1982), 49 U.S.C. §1513(d) ("Section 1513"), which prohibits discriminatory state taxation of "air carrier transportation property." The precise question presented is whether South Dakota has violated Section 1513(d)(1)(A) by subjecting "air carrier transportation property" to ad valorem taxation while exempting virtually all other types of business personalty.

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[1] RPI members are listed in Appendix A to this brief; AAR members are listed in Appendix B to this brief. The Amici appear by consent of the parties.

Although the members of RPI and AAR are not entitled to the protections of Section 1513, many of the Associations' members are beneficiaries of nearly identical federal legislation which prohibits state tax discrimination against "rail transportation property," Section 306(1)(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976), recodified at 49 U.S.C. §11503 ("Section 11503").[2] Since resolution of the statutory interpretation issue in this case may affect the interpretation and efficacy of Section 11503, RPI and AAR members have a substantial interest in the outcome of this litigation. RPI and AAR support the common-sense interpretation of Section 1513 advocated by the airlines and accepted by the dissenting judge of the South Dakota Supreme Court. Only the airlines' construction is consistent with the purpose of Section 1513 and will fully accomplish Congress' remedial objectives.

B. Relationship Between Section 1513 and Section 11503

1. Statutory Language

The statute at issue in this case, Section 1513(d)(1)(A), prohibits discriminatory state taxation of "air carrier transportation property" in the following terms:

> (d) *Burdensome and discriminatory acts.*
> (1) The following acts unreasonably burden

[2] The recodification of Title 49 in 1978 substantially altered the language of Section 306. However, such changes were not intended to affect the substantive meaning of the Act. *See,* The Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, §3, 92 Stat. 1466 (Oct. 17, 1978). For the Court's convenience the language of Section 306 is reproduced in Appendix C to this brief.

> and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

The purpose of Section 1513 is to "[make] current law which prohibits the assessment, levying or collecting of taxes on motor carier property in a manner different from that of other commercial and industrial property, applicable to air carriers." H. Conf. Rep. No. 97-760, 97th Cong., 2d Sess. (Aug. 17, 1982), *reprinted in* 1982 U. S. Code Cong. & Ad. News 1190, 1484.

As befits this purpose, the language of Section 1513 is patterned after, and derived from, the language of the Motor Carrier Act of 1980, Pub. L. No. 96-296, §26(a)(1), 94 Stat. 823 (Jul. 1, 1980), 49 U.S.C. §11503a(b)(1) ("Motor Carrier Act"), which states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or a subdivision of a State may not do any of them:

> (1) Assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

The prohibitions of the Motor Carrier Act are "intended to apply to [state] taxes such as those on real or personal property, general sales taxes, or other levies that are parts of general tax structure applicable to a variety of commodities, operations, and commercial activities." H. R. Rep. No. 96-1069, 96th Cong., 2d Sess. 45 (1980), *reprinted in* 1980 U. S. Code Cong. & Ad. News, Legislative History, 2327.

The Motor Carrier Act is, in turn, based upon the language of Section 306(1)(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 which, as recodified in Section 11503(b)(1), states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce. and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market

> value of the other commercial and industrial property.

Under Section 1513(d)(2)(c), "air carrier transportation property" is defined to mean "property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation." "Commercial and industrial property," the class of property with which assessments of air carrier transportation property must be compared under Section 1513, is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." Section 1513(d)(2)(D).

Like the substantive provisions of Section 1513, the definitional terms of Section 1513 are based upon the language of Section 11503 and the Motor Carrier Act. Sections 11503(a)(3) and (4) define "rail transportation property" and "commercial and industrial property"as follows:

> (3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under [the Interstate Commerce Act].
>
> (4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

The Motor Carrier Act defines "motor carrier transportation property" and "commercial and industrial property" in precisely the same terms. 49 U.S.C. §11503a(d)(1)(4).[3]

Section 1513 and the Motor Carrier Act plainly share the same statutory antecedent: Section 11503. The legislative history of Section 11503 is, therefore, indicative of Congress' objectives in enacting Section 1513.

2. Legislative History

In 1961, a Special Study Group on Transportation Policies in the United States (established by Senate Resolution) concluded that discriminatory state taxation of railroad and pipeline property imposed an undue burden on interstate commerce. *See* S. Rep. No. 445, 87th Cong., 1st Sess. (1961) (the "Doyle Report"). This Study Group recommended passage of federal legislation to exempt railroad and pipeline right-of-way from state taxation or, as an alternative, to forbid the discriminatory assessment of property owned or used by interstate carriers. Doyle Report, pp. 463, 465. Concurrently with the issuance of the Doyle Report, bills were introduced in Congress that would have accomplished the latter objective. *See* H.

[3] As originally enacted, the Motor Carrier Act limited the definition of "motor carrier transportation property" to property owned or used by "motor carrier[s] of *property* providing transportation in interstate commerce." [Emphasis added.] 94 Stat. 823. However, the Bus Regulatory Reform Act of 1982 amended the Motor Carrier Act to delete the words "of property" from the definition of "motor carrier transportation property" and thereby extended the protections of the Act to bus lines. *See* Pub. L. No. 97-261, §20, 96 Stat. 1122 (Sept. 20, 1982).

R. 742, 87th Cong., 1st Sess. (1961); H. R. 7497, 87th Cong., 1st Sess. (1961).

Over the next fifteen years, Congress considered a series of legislative proposals that would have forbidden state tax discrimination, not only against railroads and pipelines, but against *all* common and contract carriers regulated by the Interstate Commerce Commission (i.e., rail carriers, express carriers, pipeline carriers, motor common and contract carriers, water common and contract carriers, and freight forwarders).[4] Congressional committees conducted extensive hearings on many of these proposals[5] and concluded that: (i) state tax discrimination against surface transportation property was pervasive and constituted an undue burden on interstate commerce; (ii) state laws which guaranteed equitable tax treatment for interstate carriers had not been observed; and (iii) state administrative and judicial remedies had not af-

[4] *See, e.g.*, H. R. 736, 88th Cong., 1st Sess. (1963); H. R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong. 2d Sess. (1966); H. R. 1489, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong., 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969); S. 3945, 92d Cong., 2d. Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973); H. R. 5385, 93d Cong., 2d Sess. (1974); S. 2841, 94th Cong., 1st sess. (1975); S. 2718, 94th Cong., 1st Sess. (1975).

[5] See, *e.g.*, *Hearing on H. R. 736 and H.R 10169 Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. (1964); *Hearings on H. R. 4972 and Identical Bills Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966); *Hearings on S. 927 Before the Subcomittee on Surface Transportation of the House Committee on Commerce*, 90th Cong., 1st Sess. (1967); *Hearings on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. (1969).

forded interstate carriers an efficient and effective means of obtaining relief from discriminatory state taxation.[6] These committees recommended that Congress establish a clear federal policy against discriminatory state taxation of transportation property and create an efficient federal judicial remedy to enforce that policy against the states.[7]

In late 1975 and early 1976, during the course of congressional debates that led to the passage of Section 11503, Senate and House conference committees restricted the class of interstate carriers that would be entitled to federal protection from discriminatory state taxation solely to interstate carriers by rail.[8] This was accomplished by changing the proposed statutory definition of "transportation property" from "property . . . which is owned or used by a common or contract carrier subject to economic regulation under Part I, II, III or IV of [the Interstate Commerce Act]" to "property, as defined in the regulations of the [Interstate Commerce] Commission, owned or used by a carrier by railroad subject to this part." *Compare,* S. 2718, 94th Cong. 1st Sess. (1975) *with* H. R. 10979, 94th Cong., 1st Sess. (1975).

By enacting Section 11503, Congress intended to prohibit discriminatory state taxation of the railroad industry "in any form whatsoever." *Ogilvie v. State*

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[6] *See, e.g.,* S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); S. Rep. No. 92-1085, 92d Cong., 2d. Sess. (1972); H. R. Rep. No. 93-1381, 93d Cong., 2d Sess. (1974).

[7] *Id.*

[8] *See* S. Rep. No. 94-585, 94th Cong., 1st Sess. 138-39 (1975); H. R. Rep. No. 94-781, 94th Cong., 2d Sess. 166 (1976).

Board of Equalization of the State of North Dakota, 492 F. Supp. 446 (D. N.D. 1980) *aff'd,* 657 F.2d 204, 210 (8th Cir.) *cert. denied.* 454 U. S. 1086 (1981). By enacting Section 1513, Congress plainly intended to extend to air carriers essentially the same federal protections that had been extended previously to other instrumentalities of interstate commerce.[9] Since the congressional purposes underlying Section 1513, Section 11503 and the Motor Carrier Act are coincident, the judicial interpretation given Section 1513 should be harmonized with the interpretation given Section 11503 and the Motor Carrier Act.

C. Discrimination Against Air Carrier Transportation Property In South Dakota

In South Dakota, airline "flight property" (and the property of selected public utilities) is valued and assessed for ad valorem tax purposes by a central state agency, the South Dakota Department of Revenue. By contrast, the business personal property of non-utility taxpayers in South Dakota ("locally-assessed" taxpayers) is exempt from taxation.

Defined under South Dakota law as "all aircraft fully equipped ready for flight used in interstate commerce," "flight property" is exclusively personal and is indisputably "air carrier transportation personal property" within the meaning of Section 1513. Thus,

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[9] The Motor Carrier Act differs from Section 11503 only in that it does not contain any language similar to Section 11503(b)(4), which specifically prohibits, *inter alia,* the imposition of discriminatory state taxes other than property taxes. Section 1513 differs from Section 11503 in that it does not contain any language similar to Section 11503(b)(4), or expressly confer jurisdiction upon federal district courts to hear airline complaints of discrimination.

while air transportation personalty in South Dakota is taxed at levels as high as 60% of market value, most "commercial and industrial"personal property in the state is exempt. This is the discrimination of which the airlines complain.

SUMMARY OF ARGUMENT

The purpose of Section 1513 is to guarantee air carriers equitable state tax treatment vis-a-vis other business taxpayers. Section 1513(d)(1)(A) requires South Dakota to assess air carrier transportation property for ad valorem tax purposes at the same ratio of assessed value to true market value at which all other "commercial and industrial property" within the state is assessed. Although section 1513 defines "commercial and industrial property" as "property devoted to a commercial and industrial use and subject to a property tax levy," major classes of business personalty that are exempt under state law must be taken into account when computing the overall level of assessment of "commercial and industrial property." To hold otherwise would permit states, such as South Dakota in this case, to classify business property by exemption and to effectively impose property taxes solely upon the personalty of air carriers.

The qualifying language, "subject to a property tax levy," as it appears in the definition of commercial and industrial property was intended by Congress to exclude from the class of "commercial and industrial property" only traditionally exempt property, such as churches, charitable institutions, homesteads and the like. South Dakota must, therefore, equalize its assessments of air carrier transportation property at a level which takes into account the total exemption of

business personalty owned by locally-assessed taxpayers in the state.

ARGUMENT

"Commercial and industrial property" is defined for purposes of Section 1513 as property devoted to a business use and "subject to a property tax levy." Reasoning that exempt business personalty is not "subject to a property tax levy," the South Dakota Supreme Court held that such property is not "commercial and industrial property" within the meaning of Section 1513(d)(2)(D). The Supreme Court concluded that Section 1513 affords the airlines no relief from discrimination that arises from the total exemption of personal property which is devoted to a business use and which is owned by locally-assessed taxpayers. In so holding, the South Dakota Supreme Court relied primarily upon language from the district court's opinion in *Ogilvie v. State Board of Equalization of the State of North Dakota,* 492 F. Supp. 446 (D. N.D. 1980), *aff'd,* 651 F.2d 204 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981).

In *Ogilvie,* interstate railroads contended that, where the personal property of locally-assessed business taxpayers is exempt from taxation, the imposition of a state ad valorem tax upon the personal property of railroads and other centrally-assessed business taxpayers constitutes a violation of Section 11503(b)(1). Because locally-assessed business personal property is exempt from taxation in North Dakota and not technically "subject to a property tax levy," the North Dakota district court reasoned (as did the South Dakota Supreme Court here) that Section 11503(b)(1) did not authorize a reduction in the level

of assessment of railroad personalty to the "zero" assessment level applicable to the personal property of locally-assessed taxpayers. 492 F. Supp. at 453-54. However, the district court observed that Section 11503(b)(4) forbids the imposition of "another tax [i.e., a tax in addition to, or other than, a property tax that violates Section 11503(b)(1), (2) or (3)] that discriminates against a rail carrier providing transportation under [the Interstate Commerce Act]."[10] The court held that the "another discriminatory tax" language of Section 11503(b)(4), rather than the "assessment" language of Section 11503(b)(1), encompasses and prohibits discrimination which arises from the exemption of personalty owned by locally-assessed business taxpayers.

On appeal, the Eighth Circuit affirmed the district court's holding that Section 11503 was intended to prohibit tax discrimination against rail transportation property in any form whatsoever and that North Dakota could not, therefore, tax railroad personalty. 657 F.2d at 210. The Eighth Circuit did not, however, specifically address the question of whether Section 11503(b)(1) also prohibited North Dakota from taxing

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[10] Cases which hold that Section 11503(b)(4) prohibits all forms of discriminatory state taxation of the railroad industry include: *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir. 1985) ("loaded-mile" tax); *Richmond, Fredericksburg & Potomac R. R. v. Dept. of Taxation*, 762 F.2d 375 (4th Cir. 1985) (income tax); *Alabama Great Southern R. R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (license tax); *Atchison, Topeka & Santa Fe R. R. v. Bair*, 338 N.W.2d 338 (Iowa 1983) (diesel fuel tax). As noted previously, fn. 9, *supra*, the "another discriminatory tax" provision of Section 11503(b)(4) is not included in either Section 1513 or the Motor Carrier Act.

railroad personalty while exempting other business personalty.

Although the result in *Ogilvie* was correct, the North Dakota district court's observations concerning the definition of "commercial and industrial property" and the scope of Section 11503(b)(1) are erroneous and, if applied to Section 1513 (and the Motor Carrier Act), produce absurd results. Presumably, the South Dakota Supreme Court would concede that, if business personalty *were* "subject to a property tax levy" and assessed at some rate lower than that applicable to airline personal property, Section 1513 would require South Dakota to include locally-assessed personalty in computing an average assessment ratio for commercial and industrial property. Indeed, under the plain language of Section 1513, and under the federal decisions that have interpreted Section 11503(b)(1),[11] the South Dakota Supreme Court must hold that the state would be in violation of Section 1513 if business personalty in the state were subject to taxation at a ratio of, say, only .0005% and air carrier transportation personalty were assessed at 60%. Therefore, it is illogical for the South Dakota Supreme Court to hold that, because business personalty is not subject to *any* tax in South Dakota and discrimination against air carrier transportation personalty is absolute, the airlines are entitled to no relief under Section 1513. In *Northwest Airlines, Inc. v. State Board of Equalization*, 258 N.W.2d 515 (N.D. 1984), the North Dakota Supreme Court perceived this flaw in the *Ogilvie* analysis and held that, even in the absence of a pro-

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[11] *See, e.g., Clinchfield R. R. v. Lynch*, 527 F. Supp. 784 (E.D. N.C. 1981) *aff'd*, 700 F.2d 126 (4th Cir. 1983).

vision similar to Section 11503(b)(4), Section 1513(d)(1)(A) prohibits North Dakota from taxing airline personalty while exempting other business personalty.

Rail car companies that operate in Florida are now faced with precisely the same sort of discrimination that face the airlines here. Prior to the 1982 tax year, 90% of the value of manufacturing inventories, and 99% of the value of all other business inventories, were exempt from ad valorem taxation in Florida. For the 1980 and 1981 tax years, Trailer Train Company (a rail car company and a member of RPI) filed suit under Section 11503 and obtained a federal court order directing the Florida Department of Revenue to take into account the 10% and 1% assessment levels of manufacturing and business inventories when calculating the overall level of assessment of "commercial and industrial" property throughout the state. *See Trailer Train Co. v. Dept. of Revenue,* No. TCA 81-0772 (N.D. Fla. May 10, 1985). The Florida Department of Revenue complied with the federal court order and equalized Trailer Train's assessment at an average level of assessment which reflected the mathematical effect of partially exempting locally-assessed business personalty. However, effective January 1, 1982, Florida *totally* exempted *all* business inventories from ad valorem taxation. In making its calculation of the average level of assessment of commercial and industrial property for the 1982 tax year, the Florida Department of Revenue refused to account for the effect of totally exempt business inventories upon the overall level of assessment of business personalty in the state. Paradoxically, the average level of assessment of "commercial and industrial property" as computed by the Department for the 1982 tax year *increased* over the prior years in which business inventories were partially subject to taxation. As a consequence, notwithstanding increased discrimination against Trailer Train resulting from the total exemption of a major class of locally-assessed business personalty, Trailer Train's tax liability for the 1982 tax year increased over 1980 and 1981. [This matter is now the subject of pending litigation in *Trailer Train Company v. Department of Revenue, State of Florida, et al.,* No. TCH 82-1066 (N.D. Fla. filed Oct. 1, 1982) a case in which the Department is advancing essentially the same arguments advocated by South Dakota in this case.]

In *Arkansas Best Freight System, Inc. v. Cochran,* 546 F. Supp. 915 (M.D. Tenn. 1981), the district court properly interpreted the Motor Carrier Act to prohibit discrimination against motor carrier property resulting from the exemption of "commercial and industrial" personalty owned by locally-assessed taxpayers in Tennessee. In 1978, the Tennessee legislature authorized the governing body of each county to direct local assessors to "presume" that locally-assessed business personalty had no value. *See* Chapter 902, 1978 Tennessee Public Act, §§1-4, T.C.A. §67-5-216(b) (deleted by Chapter 793, 1984 Tennessee Public Acts, §1). Numerous Tennessee counties adopted this presumption by resolution and discontinued the assessment of locally-assessed business personalty. In 1981, various motor carriers filed suit under the Motor Carrier Act challenging Tennessee's personal property exemption scheme. Rejecting Tennessee's argument that the Motor Carrier Act did not interfere with the state's power to classify property for purposes of ad

valorem taxation, the district court ordered a refund of the carriers' personal property taxes "because the failure to tax other commercial and industrial tangible personal property pursuant to the presumption of Tenn. Code Ann. [67-5-216(b)] violates the provisions of the Motor Carrier Act of 1980." 546 F. Supp. at 919. As noted previously, the substantive language of the Motor Carrier Act is identical to Section 1513(d)(1)(A); Section 1513 should also be interpreted, therefore, to prohibit discrimination resulting from the exemption of business personalty in South Dakota.

In this case, the South Dakota Supreme Court has interpreted the phrase "subject to a property tax levy" without reference to the legislative history, or to the purpose, of Section 1513. By limiting the definition of commercial and industrial property to "property subject to a property tax levy," Congress merely intended to exclude from that definition property which had been exempt *traditionally* under state law, such as "churches, charitable institutions, homesteads, and the like." [*See* S. Rep. No. 91-630, 91st Cong., 2d Sess., 11 (1969), which explains the reasons for the "subject to a property tax" limitation in the definition of "commercial and industrial property" under the Section 11503.] Congress did not intend to exclude from the comparison class personal property devoted to a commercial use, or to sanction state classification schemes which subject air carrier transportation personalty to taxation, but which do not tax other types of commercial and industrial personalty.

By enacting Section 1513, Congress intended to eliminate both *de jure* tax discrimination against air carrier transportation property (i.e., discrimination resulting from state constitutional or statutory provi-

sions that separately classify rail transportation property for taxation), and *de facto* state tax discrimination against air carrier transportation property (i.e., discrimination or classification resulting from different valuation or assessment practices). *Ogilvie*, 657 F.2d at 210. In fashioning Section 11503, Congress specifically rejected bills that would have permitted certain states, such as Tennessee, to enforce state constitutional provisions that separately classified transportaion property under state law for taxation at rates (or assessment percentages) different from those applicable to other property. *See* S. Rep. No. 94-585, 94th. Cong., 1st Sess. 138-39 (1975); H. R. Rep. No. 94-781, 94th Cong., 2d Sess. 166 (1976). *See also* Cong. Rec. S-21078 (daily ed., Dec. 4, 1975) (Amendment offered by Senator Howard Baker); Cong. Rec. H-12815 (daily ed., Dec. 17, 1975) (Remarks of Rep. Robin Beard); Cong. Rec. H-12816 (daily ed., Dec. 17, 1975); (Remarks of Rep. Brock Adams). As stated by the Eleventh Circuit in *Alabama Great Southern Ry. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981) with respect to Section 11503:

> Until this law was passed, . . . states could constitutionally classify railroads differently from all other taxpayers for the imposition of state taxes without violating the equal protection clause of the Fourteenth Amendment. It was the obvious purpose of Congress to put an end to this practice, where such treatment of the railroads as a class was discriminatory in effect.

The same purpose underlies Section 1513.

It should also be emphasized that many of the anti-discrimination bills antecedent to Section 11503, *e.g.*,

S. 927 and S. 2289, required a comparison between the assessment ratio applicable to "transportation property" and the assessment ratio applicable to *"all other property"* in the taxing district or assessment jurisdiction.[12] [Emphasis added.] Amendments to these bills, the language of which was incorporated into Section 11503 as enacted, limited the comparison class to "commercial and industrial property." As explained by the sponsors of these amendments, the change from "all other property" to "commercial and industrial property" was intended to permit states some latitute in classifying property *"unrelated* to commercial or industrial use."[13][Emphasis added.]

This legislative history clearly demonstrates that, while states may continue to classify property by type, i.e. to classify between "real" and "personal" property, or between "tangible" and "intangible" property for purposes of taxation, state *use* classifications which treat air and rail transportation property less favorably than other property devoted to a business or economic purpose are forbidden. *State of Arizona v. Atchison, Topeka & Santa Fe R. R.*, 656 F. 2d 398 (9th Cir. 1981); *Alabama Great Southern R. R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); *State of Tennessee v. Louisville & Nashville R. R.*, 478 F. Supp. 199 (M.D. Tenn. 1979); S. Rep. No. 1483, 90th Cong., 2d Sess. 7 (1968).[14] The only *use* classes of

[12] S. 927, 90th Cong., 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969).

[13] 116 Cong. Rec. 2023 (1970)

[14] The legislative history of Section 11503 manifests a plain intention on the part of Congress *not* to interfere with classification by *type of property*, (e.g., real/personal, tangible/intangible) so long as railroad realty and personalty are treated in the same manner as commercial and industrial real and personal property. *Hearings on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st. Cong., 1st Sess. 46-47 (Jul. 1964) (Colloquy between Senator Vance Hartke and Phillip Lanier); *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 82 (1967) (Statement of James Ogden). A similar intention to permit classification among real, personal, and intangible property explains the use of language in Section 1513(d)(1)(A), which speaks of a comparison between airline property (comprised largely of personal property) and "commercial and industrial property of *the same type.*"

business property that are specifically excluded from the comparison class of "commercial and industrial property" under Section 11503, Section 1513 and the Motor Carrier Act (and for which states may continue favorable tax treatment) are agricultural land and timber-producing land. *See* Section 11503(a)(4); Section 1513(d)(2)(C).

Taxing air carrier transportation personalty while exempting the personalty of other business taxpayers is the ultimate form of use-class discrimination against owners of airline property. If states are free to classify by exemption, and to narrow or limit the class of commercial and industrial property with which airline property is to be compared, states are free to shift a major portion of the ad valorem tax burden to the airline industry (and to other instrumentalities of interstate commerce now protected by federal legislation).[15]

[15] In *ACF Industries Incorporated v. State of Arizona*, 714 F.2d 93 (9th Cir. 1983), carlines challenged Arizona's statutory formula for computing the average assessment ratio applicable

Since the early 1960's, an increasing number of states have established complete or partial exemptions for major classes of locally-assessed business personalty, while the personalty of centrally-assessed interstate carriers and public utilities has generally remained subject to tax. *See* Netzer, *Personal Property Taxation in the United States,* The Urban Research Center of New York University (1985); Netzer, *Economics of the Property Tax,* Brookings Institution (1966). Between 1959 and 1984, the number of states taxing non-farm machinery and equipment decreased from 47 to 40; the number of states taxing business inventories decreased from 46 to 20; and the number of states taxing agricultural personalty decreased from 42 to 17. *Personal Property Taxation in the United States, Table 1.* The inevitable effect of such exemptions is to narrow the personal property tax base and to shift the burden of the property tax to those, such as the airlines in this case, whose property remains

to "commercial and industrial" property throughout the state. The carlines contended that the language of Section 11503 required Arizona to include exempt business inventories in its calculation of the overall commercial and industrial assessment level. The Ninth Circuit blithely rejected this contention without any analysis or citation to authority. 714 F.2d at 94. Taken to a logical end, the decision in *ACF Industries* would permit states to exempt with impunity all business property except rail transportation property. The Amici here respectfully submit that *ACF Industries* is simply irreconcilable with Congress' plain intention to forbid classification schemes that discriminate against owners and users of rail transportation property. [For the same reasons, the district court's refusal in *Trailer Train Co. v. State Board of Equalization,* 538 F. Supp. 509 (N.D. Cal. 1982) to grant relief under Section 11503(b)(1) from "exemption discrimination" is unwarranted.]

subject to tax. This is, of course, antithetical to Congress' purposes in enacting Section 1513.[16]

Federal courts have held that the remedial provisions of Section 11503 must not be interpreted so narrowly, nor so literally, as to defeat Congress' obvious intent and to produce absurd results. *Trailer Train Co. v. State Board of Equalization,* 697 F.2d 860, 865 (9th Cir. 1983). The same rule must be applied to Section 1513. *Northwest Airlines, supra.* Section 1513 expressly prohibits the assessment of air carrier transportation property at a higher assessment ratio than that applicable to commercial and industrial property in the same assessment jurisdiction. To the extent that locally-assessed business personalty is exempt from taxation, the ratio of assessed value to true market value of such property is plainly zero.[17] By contrast, air transportation personal property is assessed in South Dakota at up to 60% of its full cash value. No clearer case of discriminatory

[16] It should be noted that many of the states which now exempt major classes of business personalty, including the State of South Dakota, established such exemptions only after Congress enacted Section 11503.

[17] Computing the *de jure* level of assessment of commercial and industrial personal property in a state where locally-assessed personalty is totally or partially exempt is not complex. The average *de jure* level of assessment of commercial and industrial personalty can be determined by: (i) using various state data, or Census Bureau data, to estimate the total market value of exempt classes of business personalty within the state; (ii) aggregating the market values of exempt personalty with the market values of business personalty that is subject to tax; and (iii) dividing the total market value of exempt and non-exempt personalty into the total assessed value for non-exempt personalty only.

treatment is imaginable and Section 1513 must be interpreted to afford air carriers relief.

CONCLUSION

The Amici respectfully submit that: (i) exempt business personalty in South Dakota is "commercial and industrial property" within the meaning and intent of Section 1513; and (ii) the "zero" assessment level of exempt personalty owned by locally-assessed business taxpayers in South Dakota must be taken into account when computing the average assessment ratio for commercial and industrial property. This case should be remanded for a determination of the overall level of assessment of commercial and industrial property in South Dakota for the relevant tax years and for the entry of an appropriate equalization order.

Respectfully submitted,

James W. McBride
Counsel of Record
Gregory G. Fletcher

LAUGHLIN, HALLE, GIBSON & MCBRIDE
Suite 1000
1612 K Street, N. W.
Washington, D. C. 20006-2082
(202) 331-8501
Attorneys for Amici Curiae

APPENDIX

APPENDIX A

MEMBERS OF THE RAILWAY PROGRESS INSTITUTE

Abex Corporation
Accurate Bushing Company
ACF Industries, Incorporated
Alco Spring Industries, Inc.
Allied International Corporation
Alsthom Atlantic, Inc.
Altoona Gear Company of Louisville
American Air Filter Company
American Standard, Inc.
Amstead Industries, Inc.
Apex Railway Products Company
Arrowsmith Industries, Inc.
Asfor Steel Corporation
Bachman Associates
Bethlehem Steel Corporation
Bombadier, Inc.
Brenco, Inc.
Buffalo Brake Beam Company
Burro Crane, Inc.
Camcar/Textron
Canadian Metal Rolling Mills Limited
Canron Corporation
Cardwell Westinghouse
CF&I Steel Corporation
Chicago Freight Car Leasing Company
Chrysler Corporation
CL Rail Trucks, Inc.
Comstock Engineering, Inc.
Dapco Industries
Dayco Corporation
De Leuw, Cather & Company
Dixie Precast, Inc.

Dresser Industries, Inc.
E. I. DuPont de Nemours & Co., Inc.
W. A. Edwards & Associates, Inc.
Emons Industries, Inc.
Evans Products Company
Faiveley Corporation
Farr Company
Ferrostaal Corporation
Fruit Growers Express Company
General American Transportation Corporation
General Electric Company
General Electric Railcar Services Corporation
General Motors Corporation
General Signal Corporation
General Standard Company
GLNX Corporation
Greenville Steel Car Company
The Gregg Company, Ltd.
Gunderson, Inc.
Henkels & McCoy, Inc.
Hennessy Products, Inc.
Hughes Railway Supplies
IEC-Holden, Inc.
International Thomson Transport Press
IRECO, Inc.
Itel Rail Corporation
JMW Settlements, Inc.
Keystone Railway Equipment Company
Knorr Brake Corporation
Koppers Company, Inc.
Lukens General Industries
Maclean-Fogg Company
Mass Transit, Inc.
The Maxson Corporation
McConway & Torley Corporation
Mellon Institute
Merrill Lynch Economics, Inc.

Metro Magazine
Microphor, Inc.
Midland-Ross Corporation
Midwest Electronic Industries, Inc.
Henry Miller Spring & Manufacturing Company
Miner Enterprises, Inc.
M. B. Mitchell & Associates, Inc.
Modern Railroads
Monogram Industries
Morton Manufacturing Company
New York Air Brake Company
North American Car Corporation
Ogontz Corporation
The Ohio Brass Company
The Okonite Company
Omark Industries
OMNI Rubber Products, Inc.
Harry F. Ortlip Company
Park Rubber Company
Pettibone Corporation
Maurice Pincoffs Co., Inc.
Pittsburgh Spring, Inc.
Pohl Corporation
Portec, Inc.
Power Parts Company
Proform, Inc.
Progressive Railroading
PTJ Publishing, Inc.
Pullman Leasing Company
Pullman Technology, Inc.
Pulse Electronics, Inc.
Racine Railroad Products, Inc.
Rail Bearing Service, Inc.
Railway Age
Railway Development Corporation
Richmond Tank Car Company
Rockwell International Corporation

SAB Ajax
SAB Harmon Industries, Inc.
Safetran Systems Corporation
Schaefer Equipment, Inc.
Norman W. Seip & Associates
SERRMI, INC.
Servo Corporation of America
Sloan Value Company
Smith Valve Corporation
Speno Rail Service Company
Standard Car Truck Company
Stedef, Inc.
Structural Rubber Products Company
A. Stucki Company
Sumimoto Corporation of America
Syro Steel Company
Szarka Enterprises, Inc.
Teleweld, Inc.
Temco Corporation
Temco Corporation
The TGV Company
Thrall Car Manufacturing Company
The Timken Company
Touchstone Railway Supply & Manufacturing Company
Trailer Train Company
Transamerica Transportation Services, Inc.
Transit America Inc.
Transportation Technology
TransTech, Inc.
Union Carbide Corporation
Union Tank Car Company
Unit rail Anchor Company
United States Rail Services, Inc.
Unity Railway Supply Co., Inc.
UTDC (USA), Inc.
Vapor Corporation
Vulcan Materials Company

Westcode, Incorporated
Western-Cullen-Hayes
Westinghouse Electric Corporation
Wheeling-Pittsburgh Steel Corporation
The Youngstown Steel Door Company

APPENDIX B

Members of the Association of American Railroads

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company

Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company

Canadian Pacific Limited
    Canadian Pacific Lines in Maine
    Canadian Pacific Lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Colorado & Southern Railway
Consolidated Rail Corporation

Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway

Galveston, Houston & Henderson Railroad Company

Grand Trunk Corporation—and other ines in the U.S. indirectly controlled by the Canadian National Railways
    Grand Trunk Western Railroad Company
    Detroit, Toledo & Ironton Railroad Company
    Central Vermont Railway, Inc.
    Duluth, Winnepeg & Pacific Railway, Inc.

    Canadian National Railways:
        Lines in Michigan
        Lines in New England
        Lines in New York
        Lines in Vermont
Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company
Illinois Central Gulf Railroad Company
    Chicago & Illinois Western Railroad Company
    Waterloo Railroad

Kansas City Southern Railway Company
    Arkansas & Western Railway Company
    Fort Smith & Van Buren Railway Company
    Kansas & Missouri Railway & Terminal Company
Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company
Louisiana & Arkansas Railway Company

McCloud River Railroad Company
McKeesport Connecting Railroad Company
Maine Central Railroad Company
    Portland Terminal Company
Manufacturers Railway Company
Metro North Commuter Railroad Company
Missouri-Kansas-Texas Railroad Company including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
    Brownville & Matamoras Bridge Terminal Company

Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
Weatherford, Mineral Wells and Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk & Western Railway Company
Chesapeake Western Railway Company
Lake Erie & Fort Wayne Railroad Company
Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin & Danville Railway Company
Peoria & Pekin Union Railroad Company
Pittsburgh & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Montour Railroad Company
Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern & Potomac Railraod Company
Seaboard System Railroad, Inc.
Gainesville Midland Railroad Company
Soo Line Railroad Company
Sault Ste. Bridge Company
Southern Pacific Transportation Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Petaluma & Santa Rosa Railroad Company
Visalia Electric Railroad Company
Southern Railway System
Alabama Great Southern Railroad Company
Algers, Winslow & Western Railway Company
Atlantic & East Carolina Railway Company
Camp Lejeune Railway Company
Carolina and Northwestern Railway Company
Central of Georgia Railroad Company

Cincinnati, New Orleans & Texas Pacific Railway Company
Georgia Northern Railway Company
Georgia Southern & Florida Railway Corporation
Interstate Railroad Company
Live Oak, Perry & South Georgia Railway Company
Louisiana Southern Railway Company
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Texas Mexican Railway Company

Union Pacific Railroad Company
Spokane International Railroad Company
Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company
Western Pacific Railroad Company
Sacramento Northern Railway Company
Tidewater Southern Railway Company
Western Railway of Alabama
Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
High Point, Thomasville & Denton Railroad

APPENDIX C

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976

Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatement of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of

any State, the district courts of the United States shall have jurisdiction, without regard to amount of controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to th true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation prop-

erty at a value which bears a higher ratio to the true market value of such transportation proprty than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transprotation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.